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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-299

FONTANA AVIATION, INC., A MICHIGAN CORPORATION,
Petitioner,

vs.

ROBERT BALDINELLI, RUDY LUNDHOLM, AVIS RENT-A-CAR SYSTEM, A DELAWARE CORPORATION, AND THE HERTZ CORPORATION, A DELAWARE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner Fontana Aviation, Inc. ("Fontana") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on May 25, 1978.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 575 F. 2d 1194 (1978). The opinion of the District Court for the Western District of Michigan, Northern Division, is reported at 418 F. Supp. 464 (1976). Both opinions are printed in Appendix A.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 25, 1978. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

Whether under the federal antitrust four-year limitations statute, 15 U. S. C. § 15(b), announcement of implementation of a conspiracy constitutes the last damage causing overt act, notwithstanding the continuing nature of the conspiracy and repeated invasions of petitioner's property rights occurring within the statutory period.

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2 and Section 4(B) of the Clayton Act, 15 U. S. C. § 15(b). The foregoing statutes are printed in Appendix B.

STATEMENT OF THE CASE.

This is a private antitrust action in which petitioner seeks recovery of damages incurred by it as a direct result of the conspiratorial conduct of defendants in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2. On defendants' motion for summary judgment, the district court held the cause barred by the statute of limitations, 15 U. S. C. § 15(b). The Sixth Circuit affirmed *per curiam*.

The facts are not, and, for the purposes of defendant's motion for summary judgment, cannot be disputed. From 1961 to 1975, Fontana owned and operated the Ford Airport terminal near Iron Mountain, Michigan. Under the terms of an agreement

leasing a portion of the airport terminal to the county for use as a public lobby, Fontana reserved for itself exclusive concession rights. Defendant Robert Baldinelli ("Baldinelli"), licensee of defendant Avis Rent-A-Car System ("Avis"), agreed, beginning in 1961, to pay Fontana 10% of Avis' gross rental receipts as a concession fee for the Avis concession at the airport, and 10% of Avis' gross rental receipts for Fontana's services as the Avis rental agent. A similar arrangement was made with defendant Hertz Corporation's ("Hertz") then licensee.

In December of 1968 Baldinelli entered into a conspiracy with defendant Rudy Lundholm ("Lundholm") designed to fix prices, restrain trade and monopolize the car rental business in the Iron Mountain area. Lundholm agreed to secure the Hertz license and thereafter to permit Baldinelli to control and operate both the Hertz agency and Baldinelli's own Avis agency. This conspiracy permitted defendants to fix and raise prices for car rentals and to reduce car rental service. Indeed, in the next several years, rate and mileage charges were increased four times on the very same day for Hertz and Avis rental cars. Weekend specials, compact rates, and the like were eliminated.

As an integral part of the conspiracy, defendants agreed to discontinue payment of concession fees to Fontana for use of the terminal facility, and to terminate Fontana's services as rental agent for Avis and Hertz. Despite orally advising Fontana of their intention to vacate the airport terminal on May 5, 1969, and publishing a public notice to that effect on May 13, 1969, the conspirators in fact never vacated the airport terminal and continued to lease cars from the lobby of the terminal. While defendants did abandon their behind-the-counter rental locations, Baldinelli or his employee, Reed, daily drove from Iron Mountain to the airport to meet incoming planes to conduct Avis and Hertz business.[1] This daily use of the terminal, in

1. In a competitive situation neither the Hertz nor the Avis licensee could have economically terminated Fontana as rental agent, for neither could have hired an independent service agent for

(Footnote continued on next page.)

violation of Fontana's concession rights, began in May of 1969 and was continuing on July 3, 1973, when this suit was filed. The complaint sought damages for the four year statutory period from July, 1969, to July, 1973.

Discovery in the case not only established beyond peradventure the essential elements of the combination and conspiracy, but also established the aforementioned continuation of the conspiracy as well as the occurrence of additional overt acts for at least six months after the complaint date.[2] Despite plaintiff's overwhelming evidence of the affirmative, ongoing nature of this conspiracy, the lower courts determined that the last, overt, damage-causing act as to plaintiff occurred in May, 1969, when the conspirators falsely announced a pullout, and that, therefore, the cause was barred by the four year statute of limitations.

(Footnote continued from preceding page.)

a fee as low as that charged by Fontana. More important, neither could have ceased to solicit business at the airport terminal. If only one had abandoned its airport location the other would have enjoyed an insurmountable competitive advantage by reason of its ability to meet incoming passengers and provide cars at the airport. However, the continuing agreement whereby Lundholm was in effect fronting for Baldinelli, granted Baldinelli a monopoly of the airport car rental business and enabled him to refuse to deal with Fontana without threat from a competitor who did utilize Fontana's rental facilities and services.

2. The deposition of Lundholm uncovered the fact that he had failed to report on his tax returns any income from his Hertz agency. To cover up these obvious tax problems, Lundholm belatedly transferred previously unreported income to Baldinelli in the form of payment for fictitious "services" performed in the previous four years.

REASONS FOR GRANTING THE WRIT.

The Holding of the Court of Appeals for the Sixth Circuit That the Violation Was Final and Fontana's Sole Cause of Action Accrued with Announcement of the Conspiracy in May, 1969, Conflicts with this Court's Zenith Decision, with the Decisions of Other Circuits, and with the Purpose of the Antitrust Laws.

The decision of the court below accepting defendants' "single blow" theory here as triggering the running of the statute of limitations, 15 U. S. C. § 15(b), conflicts directly with the decision of this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971), *reh. den.* 401 U. S. 1015 (1971). In *Zenith*, this Court recognized that in the context of a continuing conspiracy to violate the antitrust laws, a new cause of action arises each time a plaintiff is injured by an act of the conspiracy, and, as to that act, the statute of limitations begins to run anew. The lower court here, however, held that mere announcement of the intention to carry out an active combination and conspiracy constitutes the last, overt, damage-causing act for statute of limitations purposes.

That holding subverts the *Zenith* ruling. In spite of defendants' May withdrawal announcements, the boycott of Fontana's rental agency services and concession fees could not have been effected unless the conspiracy retained its vitality each and every day. Each day the conspirators advanced their monopolistic business at the airport, Fontana was deprived of its concession fees and service agent fees. Had the conspiracy broken down, defendants would have had no alternative but to use Fontana's services as their rental agent and, therefore, to pay Fontana concession fees and rental agent fees. Indeed, every day defendants advanced their business from the airport constituted a new violation of Fontana's exclusive concession rights. It is precisely

this type of continuing conduct which this Court declared in *Zenith* constituted new and separate offenses under 15 U. S. C. § 15(b).

The decision of the Sixth Circuit also creates a conflict among the Circuit Courts. The Ninth Circuit, in *Twin City Sportservice, Inc.* v. *Charles O. Finley & Company*, 512 F. 2d 1264 (9th Cir. 1975) (*rev'g and remanding on other grounds* 365 F. Supp. 235 (N. D. Cal. 1972), determined that the statute of limitations did not prevent defendants from advancing an antitrust claim in 1968 based upon a 1954 contract. The damage-causing acts complained of involved daily invasion of concession rights tied to the contract. The Ninth Circuit had no difficulty finding, for purposes of the statute of limitations, that a cause of action arose "each time the plaintiff's interest is invaded to his damage," even though the concession rights were established fourteen years prior to the lawsuit.

The Fifth Circuit, in *Poster Exchange, Inc.* v. *National Screen Service Corporation*, 517 F. 2d 117 (5th Cir. 1975), similarly recognized the *Zenith* directives in barring the statute of limitations defense where the conduct at issue consisted of an initial refusal to deal and a continuing, active conspiracy to implement that refusal. As that court recognized, the initial refusal was not the last overt act, for purposes of limitations, because, as here, the refusal to deal was without force absent an ongoing conspiracy. The court noted that an initial announcement "while perhaps unequivocal, was not of necessity permanent." 517 F. 2d at 127. The Fifth Circuit reaffirmed its *Poster Exchange* holding in *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F. 2d 1029 (5th Cir. 1977).

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967), *aff'd in this regard* 392 U. S. 481 at 502 fn. 15, 88 S. Ct. at 2236, 20 L. Ed. 2d at 1246 (1968), just as here, a monopoly originating outside the limitations period resulted in repeated invasions of plaintiff's rights, inflicting continuing and accumulating harm both outside the statutory

period and within it. The Third Circuit nevertheless held that plaintiff's right to recover for separate invasions of its rights occurring within the statutory period was not affected because injury and damage occurred outside the statutory period. 377 F. 2d at 795. This Court approved that determination, noting that plaintiff, although first entitled to sue in 1912 for injury then inflicted, was equally entitled to sue in 1955. 392 U. S. at 502 fn. 15.

Finally, this Court, as well as Congress, has always recognized that important public policies are best served by insuring that a private action exists as an ever present threat to deter anyone contemplating business behavior in violation of these laws. *Perma Life Mufflers* v. *International Parts*, 392 U. S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968). The policy of the antitrust laws has been to assist private litigants in their efforts to rectify antitrust wrongdoing. The construction given the antitrust statute of limitations by the Sixth Circuit here allows defendants to reap the fruits of their continued and extensive conspiracy merely because they announced more than four years prior to the filing of the suit that conspiratorial conduct would be undertaken. Employing the limitations statute to immunize repetition or continuation of violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions. *Poster Exchange, supra*, at 127-128. This Court must not permit the statute of limitations to serve as a sanctuary for conspirators where, as here, their damage-causing acts occurred within the four year period.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Western District of Michigan
Northern Division

FONTANA AVIATION, INC.,
Plaintiff,
vs.
ROBERT BALDINELLI, et al.,
Defendants.

M 51-73

OPINION ON MOTIONS FOR SUMMARY JUDGMENT.

This is an antitrust case alleging a conspiracy to monopolize the business of renting automobiles in the Iron Mountain, Michigan area. Plaintiff is located at the Ford Airport in Iron Mountain and is engaged primarily in the sales, service and repair of aircraft. Defendants are major rent-a-car corporations and their local licensees.

According to plaintiff, in 1961, defendants Avis and Hertz concluded exclusive license agreements with defendants Baldinelli and Anderson Motors, respectively. At this time, and throughout the development of this case, Fontana leased to Dickenson County the terminal building it had built at Ford Airport. Under that lease agreement, Fontana had exclusive right to all concessions in the public lobby of the terminal. Apparently desirous of entering into the local airport rent-a-car market, both the licensees entered into oral argreements with Fontana whereby Fontana would nandle all rentals originating at Ford Airport in exchange for a 20% share of the income from those rentals. Half of this amount represented rental of space in the terminal, and the other half was in payment for services rendered by Fontana

in preparing and processing the rental agreements and caring for rental cars. Under these arrangements, Hertz and Avis were granted space in the terminal for signs and counters, and Fontana would actually handle the car rental transaction. These agreements were also consummated in 1961.

Subsequently, defendant Baldinelli began what plaintiff believes to be a concerted effort to create in himself a monopoly in the rent-a-car business in the area. Plaintiff alleges that in 1969, Baldinelli entered into an agreement with defendant Lundholm in which Lundholm was to act as a "front" for Baldinelli and seek the Hertz license for the area. This was accomplished, and according to plaintiff, Baldinelli had then an effective monopoly.

On or before May 5, 1969, Baldinelli allegedly removed all the Avis and Hertz equipment and signs from behind the counters of the terminal building. During that same period, Baldinelli ran newspaper advertisements proclaiming that the relationship with Fontana had been terminated and that future rentals would be handled from Baldinelli's office. Fontana then demanded audits from both rent-a-car companies and was met during July, 1969, with letters stating in part that their relationship had been terminated and closing their accounts with Fontana. The instant suit was filed July 2, 1973, and seeks treble damages in the amount of $300,000, along with an injunction enjoining the defendants from further "conspiratorial activities."

Defendants have moved for summary judgment, their primary argument being that this action is barred by the statute of limitations contained in 4B of the Clayton Act, 15 U. S. C., § 15b, which provides:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless comenced within four years after the cause of action accrued. * * *"

The initial question thus becomes when this cause of action accrued. Standards for this determination have been laid down by

the Supreme Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971):

> "The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued.' 15 U. S. C. § 15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. See, e.g., Suckrow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F. 2d 196, 208 (CA 9 1950); Bluefields S. S. Co. v. United Fruit Co., 243 F. 1, 20 (CA 3 1917), appeal dismissed, 248 U.S. 595, 39 S.Ct. 136, 63 L.Ed. 438 (1919); 2361 State Corp. v. Sealy, Inc., 263 F. Supp. 845, 850 (ND Ill. 1967). This much is plain from the treble-damage statute itself. 15 U.S.C. § 15." 401 U. S. at 338, 91 S. Ct. at 806.

To similar effect in this Circuit is *Akron Pressform Mold Co.* v. *McNeil Corp.*, 496 F. 2d 230 (6th Cir. 1974):

> "This statute of limitations commences to run from the commission of the last overt act causing injury or damage. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); Garelick v. Goerlich's Inc., 323 F.2d 854, 855 (6th Cir. 1963)." 496 F. 2d at 233.

Under this rule, defendants argue that plaintiff was injured, and thus the statute began to run on the date the defendants "pulled out." If this be the case, the suit is barred since the "pull-out" occurred over four years from commencement of this suit. Plaintiff, on the other hand, argues that because of the way defendants "pulled out" and their actions immediately subsequent thereto, Fontana was not injured until formal notice of the termination was given through the July, 1969 letters. Alternatively, plaintiff argues that the statute has been tolled since it comes within an exception to the general rule, which delays the running of the statute when a "continuing conspiracy" is involved.

Each side makes reference to deposition evidence which is said to favor its interpretation of the events leading to the termination of this business relationship. Defendants point to the deposition of Mark Fontana, one of the officers of the plaintiff, arguing that he there admitted that injury was sustained as of the May "pullout."

"Q. I take it, then, the point of pull-out is when they stopped paying and that is when you first sustained your damages, and you will measure from that point on?

"A. Well, I—I'm not sure how the damage measure will be built. Our attorney has a lot to do with that. I can tell you when we were hurt.

"Q. When?

"A. And that is from the time that they stopped paying to date.

"Q. Okay. And the time you stopped writing the contracts for your commission or concession?

"A. If they are—I think they are coincident.

"Q. The same time?

"A. Right.

"Q. The May 3rd date?

"A. Right." (Pp. 89-90.)

Defendants find a similar admission in the deposition of the following colloquy from Joseph Fontana, Sr., plaintiff's president:

"Q. (By Mr. McIntyre, continuing): Based upon your own personal knowledge, when was Fontana Aviation, Inc., when did it first receive an injury as a result of the alleged conduct of Baldinelli and Lundholm?

"A. Well, immediately they quit paying us commissions, so it's still going on, every day now. Tomorrow it's going to be more.

"Q. And they stopped paying commissions as of—what did you say, Mr. McConnell? April 30, you agreed to that, '69?

"Mr. McConnell: Right. We have been damaged from May 1 on, okay? Does that help you?

"Mr. McIntyre: Yeah.

"Mr. McConnell: And we are still being damaged.

"The Witness: Still doing it now. Still doing it now.

"Mr. McConnell: And we have still got a continuing conspiracy, which you are a party to; okay?

"Mr. McIntyre: Okay. So, if I understand you, May 1 you first sustained damage, and can we use that as the termination date?

"Mr. McConnell: No, I don't know that that was the termination date, until they advised us in July we didn't know what their position was as far as paying concession fees. We knew that they weren't using our services.

"Q. (By Mr. McIntyre, continuing): You knew as of that date, one, they had removed their signs?

"A. Yes."

Plaintiff finds support for its views in this same colloquy, while at the same time stressing other deposition testimony which is said to cast light on the details of the "pullout" and Fontana's reactions to it:

"Q. And Baldinelli took his out on May 3rd; right?

"A. As far as I know, Baldinelli picked them all up and didn't tell me. Just told the office girl.

"Q. That was on May 3rd; wasn't it?

"A. About that time.

"Q. And Lundholm left a few days after Baldinelli, according to your pleadings; isn't that right?

"A. They left exactly at the same time, as far as I know." Joseph Fontana, Sr. Deposition, p. 35.

"Q. Okay. But the time when Red Baldinelli, Mr. Baldinelli, Defendant in this lawsuit terminated his relationship with you, went out and got his rental forms, went out and got his Hertz charge plate thing, that was May 3rd; right?

"A. That's all he did though. He didn't tell me he was terminating.

"Q. That was May 3rd; was it not?

"A. He didn't tell me nothing at that time.

"Q. When did he first tell you he was terminating?

"A. He never did tell me." *Id.* at 39.

"Q. When he came out and took those two things and his signs on May 3rd, did he lodge any complaints with you?

"A. He didn't talk to me at all.

"Q. Did he talk to anyone else out there; if you know?

"A. Well, as far as I know he just told my office girl he was taking those out, that she wouldn't have to make out any more rental agreements.

"Q. Okay. Who was that office girl?

"A. I don't recall.

"Q. You don't recall her name?

"A. No. Which one it was, no." *Id.* at 110-111.

"Q. (By Mr. McIntyre, continuing): Now, after that time, what I am driving at is, you said they continued to write agreements out there, right?

"A. Um-hmm.

"Q. And what, who was doing that?

"A. Well, Baldinelli and Leonard Reed.

"Q. Okay. And where were they doing it?

"A. On the—sometimes on the window sill, sometimes on the counter, you know, or that little office that's there, sometimes on North Central's counter. Different places in the Terminal Building." *Id.* at 176.

"Q. And you realized that, as soon as they both left on May 3rd?

"A. No. I didn't realize that until we got a response to our demand for an audit, and that occurred July the 26th, I think.

"Q. Why did that relevation come to you at that time, rather than at the time they both departed?

"A. Well, as far as we were concerned, since they were still conducting their business at the airport and out of the Terminal Building, that we had right to those concessions on that strength of our terminal lease with the County and so, like I said, we took a wait-see position at that point, to see what was going to happen, and when nothing did, they ignored us completely and when that became obvious that they weren't going to come out for an audit, talk or anything else, then we sent the letter demanding an audit." Mark Fontana Deposition, p. 150.

Under the case law already cited, the question of the accrual of this action is resolved by determining when "the last overt act causing injury or damage" occurred. This has been held to mean at that point in time when "the blow which caused

the damage was struck." *Zenith, supra; Baldwin* v. *Loew's, Inc.*, 312 F. 2d 387 (7th Cir. 1963); *Steiner* v. *20th Century Fox Film Corp.*, 232 F. 2d 190, 194-195 (9th Cir. 1956). Also, it is clear that the period of limitation is not extended merely because damages from the injury may be continuing. *Saunders* v. *National Basketball Assoc.*, 348 F. Supp. 649 (N. D. Ill. 1972).

Subsumed in this inquiry is, of course, the issue of whether or not these facts can be said to give rise to a "continuing" conspiracy. In this regard, the *Zenith* case again set the standard:

> "In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. See, *e.g.*, Crummer Co. v. Du Pont, 223 F. 2d 238, 247-248 (CA 5 1955); Delta Theaters, Inc. v. Paramount Pictures, Inc., 158 F. Supp. 644, 648 (ED La. 1958); Momand v. Universal Film Exchange, Inc., 43 F. Supp. 996, 1006 (Mass. 1942), aff'd, 172 F. 2d, at 49. However, each separate cause of action that so accures entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. See, *e.g.*, Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc., 153 F. Supp. 589, 593 (D.C., NJ 1957); Momand v. Universal Film Exchange, Inc., *supra*, 43 F. Supp. at 1006. Cf. Lawlor v. Loewe, 235 U.S. 522, 536, 35 S.Ct. 170, 172, 59 L.Ed. 341 (1915). Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years

from the accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. Moe Light, Inc. v. Foreman, 238 F.2d 817, 818 (CA 6 1956); Chicago & N. W. R. Co. v. De Clow, 124 F. 142, 143 (CA 8 1903); Culley v. Pennsylvania R. Co., 244 F. Supp. 710, 715 (D.C., Del. 1965). Cf. Howard v. Stillwell & Bierce Mfg. Co., 139 U.S. 199, 206, 11 S.Ct. 500, 503, 35 L.Ed. 147 (1891)." 401 U.S. at 338-339, 91 S.Ct. at 806.

In *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F. 2d 117 (5th Cir. 1975), the Fifth Circuit dealt with allegations of a continuing antitrust conspiracy. In the process of remanding the case, the Court set forth a number of criteria indicative of continuing conspiracy:

> "Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.
>
> "* * *
>
> " '[W]e are not dealing with an act which occurs within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation.' *See also* Baker v. F. & F. Investment, 7 Cir. 1970, 420 F. 2d 1191, 1200; Highland Supply Corp. v. Reynolds Metals Co., 8 Cir. 1964, 327 F.2d 725, 732; Susser v. Carvel Corp., S.D.N.Y. 1962, 206 F. Supp. 636, 651-52, aff'd, 2 Cir. 1974, 332 F.2d 505, cert. dismissed, 1965, 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed.2d 284.
>
> "* * * It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.

> "* * * As the foregoing discussion makes clear, we think it critical that the court determine whether there was, during the period sued upon, a mere absence of dealing, or whether there was some specific act or word precluding Poster from obtaining supplies from National Screen." 517 F. 2d at 126-128.

When the instant case is viewed in this light it cannot be concluded that a "continuing conspiracy" is involved. Rather, it is apparent that the Court is confronted with a "violation final at its impact," "an actionable wrong * * * by its nature permanent at initiation wtihout further acts * * *" which occurred "within some specific and limited time span."

In *Poster Exchange* the Court found that the plaintiff had been actively excluded for a sustained period of time from any participation in the industry it sought to enter. There is no evidence of that type of conduct here. There is nothing to indicate that Fontana could not have endeavored to secure an exclusive rent-a-car license arrangement for itself had it chosen to do so. Fontana's case is much closer to the so-called antitrust "termination" cases. An example is *Emich Motor Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956). There, Emich had a formal dealer contractual relationship with General Motors which General Motors terminated. The Seventh Circuit upheld the trial court's dismissal of the action and its finding that the statute began running at the date of cancellation.

Furthermore, the instant situation is distinguishable from cases in which continuing conspiracies have been found. In *Pioneer Co., Inc.* v. *Talon, Inc.*, 462 F. 2d 1106 (8th Cir. 1972), after distinguishing the *Emich* case, the Court stated:

> "Pioneer, on the contrary, suffered a continuing conspiracy to prevent it from wholesaling Talon zippers at discount prices; it subsequently placed orders which were refused because of the continuing conspiracy. It had no contract, as did Emich, and there was nothing to cancel—only orders to refuse which Talon and Donahue did refuse on September 4th. It is, therefore, clear that even though

Donahue gave notice, it terminated nothing of legal significance. See 2361 State Corporation v. Sealy, Inc., 263 F. Supp. 845, 851 (N.D. Ill. 1967). Subsequent orders placed in due course were rejected because of the continuing conspiracy and specific damage resulted.

"This is not a case where a single act causes damages that are suffered over a long period of time. Here, to maintain their manufacturers' price, Talon and Donahue were obliged to continue their violation of the antitrust laws by refusing to sell to Pioneer on its request. Since the record shows continued refusals until at least September 4, 1964, the action is not barred." 462 F. 2d at 1108.

Thus, the question of "when the blow was struck" must be viewed in terms of discreet, ascertainable acts and events rather than, in the words of *Poster Exchange*, a "continually accruing cause of action." When the evidence here is analyzed with the legal principles enunciated earlier, the Court must conclude that the "blow was struck" when the relationship between the parties was actually terminated, that is, at the time of the "pullout" during May, rather than when the formal written notice of the fact was made in July. The "pullout" was the specific act which gave rise to the damages which Fontana argues continues to this day; that later incidents are but its consequences. The deposition evidence reads that plaintiff knew, and was on notice, of the "pullout" that the previously-agreed upon relationship between the parties was no longer what it was. Moreover, within ten days of the "pullout", Avis published a "Public Notice" in the local newspaper stating: "Therefore, AVIS * * * has decided to terminate its operations from the Ford Airport terminal building * * * Avis rental notifies all of its customers to come to its downtown office." This should have left no doubt in plaintiff's mind that its relationship was in fact severed.

Moreover, since the plaintiff does not contend that the defendants attempted to fraudulently conceal the termination, the case law is clear that plaintiff's purported indecision and/or

apparent ignorance of its rights is insufficient to withstand a statute of limitations defense or to toll its operation. *Akron Pressform Mold Co., supra; Laundry Equipment Sales Co.* v. *Borg-Warner Co.*, 334 F. 2d 788, 792 (7th Cir. 1964). Nor do we find merit in plaintiff's contention that the statute is tolled because the future damages attributable to defendants' action are "speculative."

"It should be noted that the *Zenith* case does not require that the plaintiff have the best evidence possible of his damage, but rather only that the damages be provable. This court is aware that in some cases, and perhaps this is one, damages are better proven at a later time. However, that does not mean at an earlier point in time, enough evidence of damage was not available to allow the issue to go to a jury. When there is enough evidence to allow the issue to go to a jury the damages are no longer speculative, notwithstanding that at a later time better evidence of damage might become available. 'The *moment* the victim can prove * * * damages, the statute begins to run leaving four more years * * * to assert them.' Poster Exchange, Inc. v. National Screen Service Corp., 456 F. 2d 662, 667 (5th Cir. 1972) [Emphasis added]." *Monana Shores, Inc.* v. *U. S. Steel Corp.*, 374 F. Supp. 936, 939 (D. Minn. 1973).

This rationale is fully applicable here. The evidence reveals that there has been a nine-year course of dealing between the parties. This is clearly sufficient to allow the issue of damages to go to the jury.

In view of the fact that it is determined that there is not a continuous conspiracy here, and because the operative event which gave rise to the injuries alleged herein took place beyond the limitations period, it is concluded that plaintiff's action is barred by the statute of limitations embodied in the Clayton Act. Accordingly, defendants' motions for summary judgment are GRANTED.

IT IS SO ORDERED.

/s/ WENDELL A. MILES,
United States District Judge.

No. 76-2245

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

FONTANA AVIATION, INC.,
Plaintiff-Appellant,

vs.

ROBERT BALDINELLI, RUDY LUNDHOLM, AVIS RENT-A-CAR SYSTEM and THE HERTZ CORP.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Michigan, Northern Division.

Decided and Filed May 25, 1978.

Before PHILLIPS, Chief Judge, MERRITT, Circuit Judge, and RUBIN, District Judge.*

PER CURIAM. This antitrust action was dismissed by the district court on the ground that it is barred by the four year statute of limitations contained in 15 U.S.C. § 15b.[1] Fontana Aviation, the plaintiff, appeals. We affirm. For a recitation of pertinent facts reference is made to the opinion of District Judge Wendell Miles, published at 418 F.Supp. 464 (W.D. Mich. 1976).

The action was instituted to obtain triple damages and injunctive relief against an alleged conspiracy to monopolize

* Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

1. Any action to enforce any cause of action under §§ 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

the business of renting automobiles in the airport at Iron Mountain, Michigan. The suit was filed July 2, 1973. The district court held that all events constituting the alleged conspiracy occurred on or before May 5, 1969, and that the last overt act causing injury or damage occurred more than four years before the suit was filed.

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 338 (1971), the Supreme Court enunciated standards for determining when a cause of action accrues in an antitrust action, saying:

> The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U.S.C. § 15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. See, *e. g.*, *Suckow Borax Mines Consolidated, Inc.* v. *Borax Consolidated, Ltd.*, 185 F. 2d 196, 208 (CA9 1950); *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 F. 1, 20 (CA3 1917), appeal dismissed, 248 U. S. 595 (1919); *2361 State Corp.* v. *Sealy, Inc.*, 263 F. Supp. 845, 850 (ND Ill. 1967). This much is plain from the treble-damage statute itself. 15 U. S. C. § 15.

In *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F. 2d 230, 233 (6th Cir.), *cert. denied*, 419 U. S. 997 (1974), this court said:

> This statute of limitations commences to run from the commission of the *last overt act causing injury or damage.* (emphasis added).

Fontana contends that each day the Avis Rent-A-Car System and the Hertz Corporation conducted car rental business from the airport terminal building in violation of Fontana's exclusive concession rights constituted a separate and new cause of action as to which the statute of limitations began to run anew. For the reasons stated in the opinion of the district court, we con-

clude that the record does not support Fontana's theory of a continuing conspiracy.

All other contentions made by Fontana have been considered and found to be without merit.

AFFIRMED.

APPENDIX B.

STATUTES INVOLVED.

The statutes involved are:

1. Section 1 of the Sherman Act, 15 U. S. C. § 1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act, 15 U. S. C. § 2, which provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. Section 4(b) of the Clayton Act, 15 U. S. C. § 15(b), which provides:

> Any action to enforce any cause of action under sections 15, 15a or 15c of this title shall be forever barred unless commenced within four years after the cause of action

accrued. No cause of action barred under existing law on the effective date of this section and section 15a and 16 of this title shall be revived by said sections.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-299

FONTANA AVIATION, INC., A MICHIGAN CORPORATION,
Petitioner,

vs.

ROBERT BALDINELLI, RUDY LUNDHOLM, AVIS RENT A CAR SYSTEM, A DELAWARE CORPORATION, AND THE HERTZ CORPORATION, A DELAWARE CORPORATION,
Respondents.

BRIEF OF RESPONDENT, AVIS RENT A CAR SYSTEM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF OF RESPONDENT, AVIS RENT A CAR SYSTEM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Avis Rent A Car System, opposes the granting of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is reported at 575 F. 2d 1194 (1978). The opinion of the District Court for the Western District of Michigan, Northern Division, is reported at 418 F. Supp. 464 (1976). Both opinions are printed in Appendix A to the Petition.

JURISDICTION.

Respondent does not question this Court's jurisdiction, as set forth in the Petition.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW.

The Petition does not correctly set forth the legal issue sought to be reviewed. That issue has nothing to do with "announcement" of a conspiracy, as petitioner now claims for the first time. Rather, the correct issue is whether a civil antitrust suit, alleging a conspiracy among respondents to terminate an oral license arrangement with petitioner, is barred by the four year statute of limitations, where petitioner admitted that the termination occurred, with its full knowledge, on May 3, 1969, but suit was not commenced until July 2, 1973?

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Section 4(B) of the Clayton Act, 15 U. S. C. § 15(b). The foregoing statutes are printed in Appendix B to the Petition.

COUNTER-STATEMENT OF THE CASE.

Petitioner (hereinafter "Fontana") ignores the allegations of its own complaint and seeks to allege a cause of action in this Court which it never pleaded below.

In the trial court, Fontana claimed to have held the exclusive right to all concessions at Ford Airport in Iron Mountain, Michigan, for a period ending in 1975 (112a-115a).* It alleged

* References to ". . . a" are to the Supplemental Joint Appendix which respondents Avis and Hertz found necessary to file in the Court of Appeals, because Fontana, appellant in that court, failed

(Footnote continued on next page.)

that it entered into oral agreements with Robert Baldinelli and Rudy Lundholm, two local businessmen who were, respectively, the local licensees of respondents Avis and Hertz. Fontana did not allege that it had any contract or other relationship with Avis or Hertz, neither of which had any business dealings with it (2a-4a).

The agreements which Fontana had with the two licensees provided that they would pay to Fontana 20% of all time and mileage charges on each car rental which originated or terminated at Ford Airport (4a).* Half of the 20% charge was a concession fee for use of the terminal space and half was payment for Fontana's checking of cars and processing of rental agreements. The gist of Fontana's claim was that Baldinelli and Lundholm ". . . agreed not to pay any fees to Fontana and to withdraw their rental offices from Ford Airport" (4a). Fontana further alleged that such action was taken "with the knowledge, agreement, consent and participation of defendants Hertz and Avis . . ." (5a). Avis and Hertz are not otherwise alleged to have damaged petitioner.**

The car rental businesses of Baldinelli and Lundholm were minor adjuncts to other individual businesses which they conducted (and continue to conduct) in Iron Mountain.

(Footnote continued from preceding page.)

to file an appendix. Pursuant to Rule 21, respondents have requested the Clerk of the Court of Appeals to certify that portion of the record to this Court.

* Ford Airport is located in Kingsford, Michigan, which had a 1970 population of 5,276. Nearby Iron Mountain had a 1970 population of 8,702. Dickinson County had a 1970 population of 23,753. See 1970 U. S. Census.

** Avis itself had no operations in Iron Mountain or at Ford Airport. As is customary in such small communities, Avis contracted with an independent licensee to provide car rentals. Avis' sole source of revenue was a set percentage of its licensee's gross revenues. Avis' revenues were neither increased nor reduced by the expenses of its licensee.

For all of 1969 Avis received license fees from Baldinelli of *less* than $1,500.

Sometime between May 1 and 5, 1969, Baldinelli physically withdrew from the Ford Airport, taking with him a clock bearing the Avis name, his credit card machine, and all rental agreements (50a-51a, 75a-76a; Dep. R. E. Baldinelli, p. 60).* After May 5, 1969, Baldinelli refused to pay to Fontana any of the 20% fee. Baldinelli testified that he withdrew from the airport because he was dissatisfied with Fontana's service and because Fontana refused to negotiate a reduction of the 20% fee, which Baldinelli felt was too high (Dep. R. E. Baldinelli, pp. 58-60; Ex. 31). Whatever the reason for Baldinelli's withdrawal, the crucial fact is that the act of withdrawal occurred no later than May 5, 1969; that Fontana was paid nothing by Baldinelli for rentals originating from or terminating at the airport after that date; and that Fontana personnel never wrote an Avis rental agreement after that date (55a, 70a, 76a).

At about the same time, but no later than May 5, 1969, Lundholm, the Hertz licensee, removed his equipment from Ford Airport and thereafter paid nothing to Fontana for Hertz cars checked in or out of the airport (51a). Fontana personnel never prepared a Hertz rental agreement after that date (70a).

There was no secret about Baldinelli's strong feelings that he was being cheated by Fontana's insistence on receiving a 20% fee. Indeed, Joseph Fontana, Sr., the company's president in 1969, testified that Baldinelli had placed an advertisement in the May 13, 1969, *Iron Mountain News* stating he could not do any more business with Fontana and wasn't going to pay any more concession fees (54a, 72a-73a). In addition, an advertisement placed by Baldinelli appeared in the May 22, 1969, *Iron Mountain News* purporting to show the disparity between what he had paid Fontana and what licensees at other airports were paying (Dep. of R. E. Baldinelli, p. 61; Ex. 32).

The extensive discovery in this case indicates that there is no dispute as to the facts described above, and Fontana admitted that this was so.

* References to "Dep." are to deposition transcripts in the record but not reproduced in the Appendix.

The thrust of Fontana's complaint, filed four years and two months after Baldinelli and Lundholm's withdrawal, was that they conspired to *jointly withdraw from the airport*, with the knowledge and participation of Hertz and Avis (3a-4a). Fontana charged that this was a violation of Section 1 of the Sherman Act. While also using the term "monopoly" in its complaint, and referring to Section 2 of the Sherman Act, Fontana never articulated just what its Section 2 theory was or how it was injured by the claimed monopoly.

Each of the four respondents categorically denied participating, directly or indirectly, in any conspiracy or monopoly (7a-15a). Despite extensive discovery, Fontana could not point to one fact which even remotely suggested that Avis knew of—let alone suggested, consented to or participated in—the action of its licensee in a tiny town in which Avis had but a *de minimis* business interest.

Assuming that petitioner had stated a claim under the federal antitrust laws, that claim arose, if at all, on the date of the *withdrawal* by Lundholm and Baldinelli from the airport. Significantly, Fontana claimed below that the act of withdrawal itself caused it injury at that time, and that the company was injured when the licensees stopped paying commissions (71a-72a). Fontana fixed that date as May 3, 1969 (93a). Moreover, the fact of the withdrawal and the date of injury were repeatedly stipulated to in the District Court by Mr. McConnell, counsel for Fontana (and, more recently, chairman of its board as well) (46a, 69a-71a).

Shortly after the well-publicized withdrawal of the licensees, Fontana commenced a state court suit against Baldinelli for breach of contract in leaving the airport. Two and a half years later (and while the state court action was still pending) Fontana commenced this suit.

In the District Court, petitioner claimed that it could not have commenced suit within the four year period following the simultaneous withdrawal of the licensees because its damages

would have been "speculative". In fact, Fontana's officers testified on deposition that the idea of a suit did not occur to them until a discussion with its counsel in May or June, 1973, who, after hearing petitioner's theories, waited until July 2, 1973 to file a complaint. Fontana's officers gave no indication that the more than four year delay was due to any inability to assess damages. Indeed, the only reason ever suggested for such delay was that its counsel was "very busy with other things" (104a).

Faced with petitioner's claim that it should be relieved of its delay in filing suit because of the speculative nature of its damages, the District Court held that the "speculative damage" exception of the *Zenith* case did not apply. Rather this case was clearly one where petitioner's damage occurred, if at all, when the licensees withdrew: that was the damage causing act. Having failed to commence suit within the four year limitations period, Fontana's complaint was dismissed.

The Court of Appeals unanimously affirmed noting, as had the District Court, that any claimed continued use of the terminal by the licensees after their simultaneous contract cancellations did not create new causes of action. Thus, this was neither a case of continuing conspiracy nor one involving speculative damages. It involved nothing more than a claimed joint termination of oral contracts, which had clearly occurred more than four years before suit was commenced.

ARGUMENT.

1. The Lower Courts Correctly Applied the Zenith Decision to These Facts.

Both the District Court and the Court of Appeals carefully considered this Court's decision in *Zenith** and found it inapplicable to the undisputed facts of this case.

Rather than developing a new rule of law for all antitrust cases, *Zenith* created but a limited exception, and one clearly

* *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321 (1970), *reh. den.* 401 U. S. 1015 (1971).

not applicable here. Contrary to Fontana's suggestion, nothing in *Zenith* allows an antitrust plaintiff to "wait and see", selecting its own date in perpetuity for commencing suit. Precisely that point was made clear in *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F. 2d 230, 233 (6th Cir. 1974), *cert. den.* 419 U. S. 997 (1974).

> "This statute of limitations commences to run from the commission of the last overt act causing injury or damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, . . .; *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854, 955 (6th Cir. 1963). Generally, there are two means by which one can avoid the operation of the statute of limitations. One, the rule enunciated in *Zenith*, . . . provides that a plaintiff may recover damages occurring within the period of the statute of limitations that are the result of conduct occurring prior to that period, *if at the time of the conduct, those damages were speculative, uncertain or otherwise incapable of proof.*
>
> • • • • •
>
> *Since the above rules are in avoidance of the statute of limitations, the party seeking the benefit of them has the burden of proof* to establish them. All presumptions are against him, since his claim to exception is against the current of the law and is founded on exceptions. . . ." (Emphasis added.)

Despite Fontana's contrary suggestion, there was no impediment to its commencing suit in timely fashion and proceeding to recover damages, were it able to establish the conspiracy it claimed existed. Given the long history of business dealings between Fontana and Baldinelli and the simple arithmetic of computing the income Fontana says it lost, no insurmountable barrier of the kind envisioned by *Zenith* existed. *See, e.g., Monona Shores, Inc.* v. *United States Steel Corp.*, 374 F. Supp. 930 (D. Minn. 1973) ("It should be noted that the *Zenith* case does not require that the plaintiff have the best evidence possible of his damage, but rather only that the damages be provable"); *Southeastern Hose, Inc.* v. *Imperial-Eastman Corp.*, 1973 CCH

Trade Cases ¶ 74,479, p. 94,129 (N. D. Ga. 1973) (". . . *Zenith* does not stand for the proposition that a separate cause of action arises whenever plaintiff feels the impact of damages from the violative act. If such future damages were foreseeable at the time of the act, and could have been recovered in a lawsuit commenced at that time (or within four years thereafter), then *Zenith* implies that no new cause of action accrues. *To interpret the Court's opinion otherwise would vitiate the effectiveness of the statute of limitations as a statute of peace.")* (Emphasis added); *Wilmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, 1974-2 Trade Cases ¶ 75,292 (D. Minn. 1974).

Whether the licensees did or did not continue to use the airport terminal to meet customers is irrelevant to the issue of when Fontana's cause of action accrued. Indeed, Fontana's complaint contains no allegation that the licensees did so use the terminal. Rather, it alleges only that the two licensees conspired together to terminate their agreements with Fontana (3a-5a). It was that concerted termination upon which Fontana based its case. Clearly, that was the only *act* which Fontana claimed to have caused it damage.

Unlike *Zenith*, where this Court held the amount of damages to be incapable of proof, there were no such exceptional circumstances here. Fontana had in its own possession all of the data necessary to ascertain damages. Its officers never claimed otherwise. That its counsel was "very busy with other things" is not the kind of exceptional circumstance to which this Court intended that the *Zenith* rule apply.

2. The Decision Below Is in Harmony with Decisions In the Other Circuits.

The cases relied upon by Fontana to suggest a conflict among circuits bear no similarity to the facts here.

Twin City Sportservice, Inc. v. *Charles O. Finley & Co.*, 512 F. 2d 1264 (9th Cir. 1975), involved an antitrust challenge

to a continuing contract between the parties. Unlike this case, where the damage-causing act was the termination of a business arrangement (an act complete at the moment it occurred), *Finley* involved an attack upon a contract under which the parties had each continued to perform.

To like effect is *Imperial Point Colonnade's Condominium, Inc.* v. *Mangurean*, 549 F. 2d 1029 (5th Cir. 1977), where the court held that plaintiffs were not barred from challenging a 99 year condominium recreation lease, though it was signed more than four years before suit was filed, because defendant continued to enforce and receive benefits under the lease. The court described the case before it as one ". . . where the plaintiff and a defendant *entered* into a contract in the pre-limitations period that *continued in force into the limitations period.*" (549 F. 2d 1036) (Emphasis added).

Finley and *Imperial* are clearly governed by this Court's holding in *Hanover Shoe,** where defendant's lease-only policy, adopted in 1912, was held subject to challenge by suit commenced in 1955. This Court there noted that it was ". . . not dealing with a violation which, if it occurs at all, must occur at some specific and limited time span." As an example of such a case, the Court cited *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956), which, just as this case, involved the termination of a business relationship, an act final upon its occurrence. Rather, the lease under attack, to which plaintiff and defendant had been parties during the limitations period, constituted a continuing violation of the Sherman Act.

The Seventh Circuit has similarly read *Hanover Shoe* to mean that, in an action challenging the terms or enforcement of a contract, the limitations period begins to run when the contract is terminated, not when it is executed. *Baker* v. *F & F Investment*, 420 F. 2d 1191, at 1200 (7th Cir. 1970), *cert. den.* 400 U. S. 821 (1970).

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* *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U. S. 481, 502 n. 15 (1968).

Clearly the facts here do not fall within the line of cases cited by Fontana, and it cannot create a conflict by seeking to transform this termination case into one involving a continuing contractual relationship.

Nothing in *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F. 2d 117 (5th Cir. 1975) is inconsistent with the Sixth Circuit's decision here. The Fifth Circuit in *Poster Exchange* vacated a summary dismissal on limitations grounds and remanded solely for a determination of whether a specific *act* occurred within the limitations period so as to allow plaintiff to maintain its case. The court made clear that the mere absence of dealing between the parties during the limitations period would be an insufficient basis to escape the bar of Section 4B.

> "It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." 517 F. 2d at 128.

The court below correctly held that, under *Zenith*, the statute of limitations commenced running from commission of the last overt act—the alleged joint withdrawal. There being no speculative damage exception here, the decision below is manifestly correct.

CONCLUSION AND RELIEF.

By enacting Section 4B of the Clayton Act, Congress expressed a legislative policy that antitrust claims, like other claims in the law, must be pursued with reasonable promptness, lest defendants be confronted with old and stale claims long after the challenged events occurred. A generous period of four years is allowed in which to bring such claims.

Rather than involving any exceptional facts which might toll the limitations period, this case is the paradigm for application of the statute. Here, Fontana was admittedly fully

aware of the claimed damage causing act at the very moment it occurred. Unlike *Zenith*, Fontana was under no disability in promptly bringing suit within the limitations period.

A clear and correct line of precedent, uniform among the Courts of Appeals, holds that Fontana may not maintain this antitrust action. There is nothing unusual about this case. Certainly no reason exists for review by this Court of well-settled law which has been applied consistently among the circuits.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

FONTANA AVIATION, INC., A MICHIGAN CORPORATION,
Petitioner,

vs.

ROBERT BALDINELLI, RUDY LUNDHOLM, AVIS RENT A CAR SYSTEM, A DELAWARE CORPORATION, AND THE HERTZ CORPORATION, A DELAWARE CORPORATION,
Respondents.

BRIEF OF RESPONDENT, THE HERTZ CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 575 F. 2d 1194 (1978). The opinion of the District Court for the Western District of Michigan, Northern Division is reported at 418 F. Supp. 464 (1976). Both opinions are printed in Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

Whether a private antitrust action, alleging a concerted refusal of respondents to deal with petitioner, accrued when the contractual relationship between the parties was terminated more than four years prior to suit and is barred by the statute of limitations, 15 U. S. C. § 15(b).

STATUTES INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and Section 4(B) of the Clayton Act, 15 U. S. C. § 15(b). The foregoing statutes are printed in Appendix B to the Petition.

STATEMENT OF THE CASE

Plaintiff-Petitioner, Fontana Aviation, Inc. ("Fontana"), filed this action on July 2, 1973 against Robert Baldinelli ("Baldinelli"), Rudy Lundholm ("Lundholm"), Avis Rent-A-Car System ("Avis"), and The Hertz Corporation ("Hertz"). Fontana seeks treble damages under 15 U. S. C. § 15 for alleged violations of §§ 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. §§ 1 and 2. The alleged antitrust violation is a "continuing combination and conspiracy to unreasonably restrained trade" by refusing to deal with Fontana and "to monopolize the business of renting automobiles to the public in the Iron Montain and Kingsford, Michigan-Niagara, Wisconsin area." Hertz is alleged to be a proper defendant because it was aware of and acquiesced in the alleged agreement and refusal to deal by Baldinelli and Lundholm, the local Avis and Hertz licensees. (Complaint, App. 3a-5a).[1] Hertz, by its Answer, denies any involvement in or knowledge of the alleged illegal conduct of the local licensees. On defendants' motions for summary judgment, the District Court held that plaintiff's cause was barred by the statute of limitations, 15 U. S. C. § 15(b). This holding was affirmed by the Court of Appeals.

1. References are to Appellees' Supplemental Joint Appendix in the Court of Appeals, part of the record certified to this Court.

Counsel for all parties agree that the basic underlying facts are not in dispute for purposes of the motions for summary judgment. (Petition p. 2).

From 1960 through January, 1975, Fontana operated an airport terminal at Ford Airport near Iron Mountain, Michigan and claimed the exclusive right to all concessions in the terminal's public lobby. (App. 112a). In 1961 Fontana entered into an oral agreement with Baldinelli, the local Avis licensee. In 1960 Fontana and the local Hertz licensee had entered into an identical agreement which continued with Lundholm, who became the Hertz licensee in 1969. (App. 4a). Under these agreements the licensees agreed to pay Fontana a fee equaling 20% of all time and mileage charges on each rental which originated or terminated at Ford Airport. Fontana claims that the 20% fee consisted of 10% as payment for services rendered by Fontana and 10% as a "concession fee" for the privilege of operating in the public lobby. (App. 4a, 57a, 58a, 81a, 101a). There was no discussion of the length of these oral agreements or how either party could terminate the relationship. (App. 63a). From 1961 to 1969 car rental operations at Ford Airport were conducted at a counter provided by Fontana in the terminal building. Fontana employees or officers wrote rental agreements at the counter using the Hertz or Avis forms kept behind the counter and performed other rental services. (App. 56a-58a, 78a, 80a, 81a, 96a).

Fontana alleges that shortly before February of 1969 Baldinelli and Lundholm entered into a conspiracy to commit antitrust violations. (App. 4a). Lundholm agreed to obtain, and then allow Baldinelli to control, the local Hertz agency. Fontana claims that the goal of this conspiracy was accomplished when, "upon establishing monopoly control of the car rental market, Baldinelli terminated his Avis agency agreement with

Fontana and withdrew the Avis rental office from Ford Airport" and when "Baldinelli caused the Hertz agency, or caused Lundholm to terminate its agreement with Fontana and withdrew the Hertz office from the Ford airport." (App. 4a). The only other claim of the effects of the alleged conspiracy is that Baldinelli raised car rental prices. (App. 5a). There is no allegation of damage to Fontana's business by these price increases, nor any allegation or testimony that Fontana rented any cars. The only claimed damage to Fontana is the loss of it 20% fee as a result of the refusal of Baldinelli and Lundholm to deal with Fontana under the oral agreement. (App. 5a).

In February of 1969 defendant Lundholm replaced the previous Hertz licensee. (App. 85a, 101a). It was immediately "common knowledge" that such a change had occurred. (App. 87a-89a). On May 3, 1969 Baldinelli removed the Avis signs, an Avis clock, rental agreement forms, and the Avis credit card machine from the counter at Ford Airport. At the same time, Lundholm terminated his agreement with Fontana and the Hertz advertising, rental forms and machine were also removed. At the time of removal Baldinelli informed Fontana that he was taking those things out and that he would no longer use Fontana personnel. (App. 51a, 66a, 70a, 79a, 5a). Fontana was immediately aware of this "pull-out" and the empty counter. (App. 21a). Fontana has admitted that by these acts, Baldinelli and Lundholm "withdrew simultaneously from the airport terminal facilities and stopped paying rental or concession fees to Fontana Aviation" and that Fontana was aware of this as of May 3, 1969. (App. 20a, 68a).

Immediately after the removal of the Hertz and Avis equipment from the counter, officers of Fontana saw both Avis and Hertz rental agreements being written in the airport terminal lobby, rather than at the Fontana counter. (App. 70a-72a, 91a, 97a). Shortly before these events, in a letter dated April 30, 1969, Lundholm told Fontana that no further Hertz reservations could be taken by Fontana at the airport. (App. 53a,

122a). On May 13, 1969, Baldinelli announced in a public newspaper advertisement that Avis had "decided to terminate its operations from the Ford Airport terminal building with Fontana Aviation, Inc." (App. 52a, 54a, 73a). A similar advertisement was run on May 22, 1969.

The officers of Fontana stated that they were aware in early May of 1969 that the conspiracy to refuse to deal with Fontana existed, that Baldinelli and Lundholm had "pulled out in concert," (App. 106a, 102a-103a), were "in cahoots", and that Hertz and Avis were also "in it up to their ears" and were "sleeping with the local licensees." (App. 104a, 107a, 98a, 94a, 95a). Fontana also knew in May of 1969 that Baldinelli had used Lundholm as a "front" in order to "start this conspiracy." (App. 68a).

Fontana also claims that it was injured on May 3, 1969. (App. 93a-94a, 97a). Plaintiff's attorney stipulated that no payments were made to Fontana "after April 30th in the case of Lundholm for Hertz, and after May 5, in the case of Baldinelli for Avis," and that "we have been damaged from May 1 on." (App. 70a-71a). A letter of July 24, 1969, from Baldinelli to Fontana confirmed that their relationship had been terminated on May 5, 1969. (App. 51a, 120a).

On January 25, 1971, a state court action was filed by Fontana against Baldinelli, for breach of contract and damages consisting of 10% of all rental agreement charges received by Baldinelli since May 3, 1969. (App. 138a). That suit is still pending. The President of Fontana testified that, although Fontana knew there was a conspiracy to refuse to deal and that Hertz and Avis were "into it up to their ears" (App. 104a), Fontana did not then proceed against Hertz and Avis "because our antitrust attorney, Mr. McConnell (Fontana's counsel here, who is also Chairman of the Board of Directors of Fontana), was busy with other things and we felt that initially that, but for all the things were going on, the various aspects of the conspiracy, that the very least there was a contract violation and that we should get the ball rolling on that . . ." (App. 104a).

Fontana has stated that after January, 1975 it no longer owned and operated the Ford Airport terminal building. (Petition p. 2). In 1977 a second suit was filed in the Federal District Court upon the same claim for damages for the period from the filing of the instant suit, in July, 1973, through December 31, 1974. The second suit is still pending.

The District Court held that under these facts this cause was barred since the statute of limitations began to run when "the 'blow was struck' when the relationship between the parties was actually terminated, that is, at the time of the 'pull-out' during May," and "that later incidents are but its consequences." The Court of Appeals affirmed this decision and reiterated that "the record does not support Fontana's theory of a continuing conspiracy." Neither Court held, as petitioner has characterized, that the statute of limitations ran from the "announcement" or "false announcement" of a conspiracy.

I. Both Courts Below Correctly Applied This Court's Decision in Zenith v. Hazeltine in Holding Petitioner's Cause Barred by the Statute of Limitations

The decision below fully comports with the basic rule regarding the accrual of causes under the antitrust statute of limitations. That rule was reiterated by this Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321 (1971), *reh. den.* 401 U. S. 1015 (1971) as follows:

> The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is 'commenced within four years after the cause of action accrued.' 15 U. S. C. § 15(b), plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. (*Id.* at 338).

If there is more than one such overt act, the rule is that the statute runs from "the commission of the last overt act causing

injury or damage." *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F. 2d 230, 233 (6th Cir. 1974), *cert. den.* 419 U. S. 997 (1974).

Contrary to the statement of Petitioner, the holding below was not that this cause accrued upon a "mere announcement" of a conspiracy, but that the events of May, 1969 constituted the last injurious overt act. The Courts found from the record that any cause for the loss of contract service and concession fees, as claimed by Petitioner, accrued as of the actual termination of the contract and payments in May. The Court found the most apt analogy in dealer termination and refusal to deal cases. *Emich Motors Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956); *Garelick* v. *Goerlich's, Inc.*, 323 F. 2d 854 (6th Cir. 1963); *Sherman* v. *Goerlich's, Inc.*, 238 F. Supp. 728 (E. D. Mich. 1963), 341 F. 2d 988 (6th Cir. 1965), *cert. den.* 382 U. S. 830 (1965).

There is no merit in Petitioner's claim that the holding below conflicts with *Zenith* v. *Hazeltine* because of the "continuing conspiracy" aspects of *Zenith*. There is no "continuing conspiracy" exception to the statute of limitations in *Zenith*. Even in such a case, this Court indicated that the statute commences to run with the defendant's commission of an illegal overt act and will only run anew after a later, independent overt act causing separate damages. In *Zenith*, this Court said as follows:

> In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act . . . However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion including

> what he has suffered during and will predictably suffer after trial. (*Id.* at 338-339).

The statute of limitations runs only from the commission of the latest overt illegal act causing damage, even if there is a later non-damaging act or a "continuing conspiracy." In the case at bar, Petitioner Fontana is claiming antitrust injuries only from Respondents' refusal to deal with it. Thus, only one alleged illegal overt act, the refusal or termination, caused damage, as the Courts held below.

Petitioner is arguing that continued damages can extend the limitations period, an argument that is unsupported by *Zenith*. In *Southeastern Hose, Inc.* v. *Imperial-Eastman Corp., et. al.*, 1973 Trade Cases ¶ 74, 497 (N. D. Ga. 1973), the court rejected a plaintiff's argument that *Zenith* stood for this proposition, saying:

> It should be noted, however, that *Zenith* does not stand for the proposition that a separate cause of action arises whenever plaintiff feels the impact of damages from the violative act. If such future damages were foreseeable at the time of the act, and could have been recovered in a law suit commenced at that time (or within four years thereafter), then *Zenith* implies that no new cause of action accrues. To interpret the Court's opinion otherwise would vitiate the effectiveness of the statute of limitations as a statute of peace. (*Id.* at 94, 129).

Arguments based upon a "continuing conspiracy" are also irrelevant since both Courts below expressly found no support in the record for the existence of a continuing conspiracy here. In such a case this Court has stated the following rule:

> A seasoned and wise rule of this Court makes concurrent findings of two Courts below final here in the absence of very exceptional showing of error. *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214 (1947).

No such showing is made here, and the finding on this issue should be final.

The only exception to the statute of limitations propounded by *Zenith* v. *Hazeltine* is the "speculative damage" exception, which Petitioner asserted below, but has apparently now abandoned. In any event it is inapplicable here. This exception states that a plaintiff may recover damages occurring after the statute of limitations has run if damages were "speculative, uncertain or otherwise incapable of proof during the period of the running of the statute of limitations." *Akron Presform Mold Co., supra* at 233. *In Akron,* the Court held that a plaintiff has a burden of proving the applicability of this exception to the general rule that the statute commences to run from the last overt act causing injury. *Id.*

This Court has made clear that the *Zenith* exception does not apply where damage measures are available, as in the instant case. In its earlier decision in *Zenith Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1968), the plaintiff appealed *inter alia* on the basis that Zenith had not established the fact of damage. The Court pointed out that it was sufficient to show that "some damage" flowed from the illegal act, and thereafter that a plaintiff need not show with particularity the extent or scope of damage in order to get to the jury. (*Id.* at 114). In accord, see *Wilmar Poultry Co.* v. *Morton Norwich Products, Inc.*, 1974-2 Trade Cases ¶ 75,292 (D. Minn. 1974), 520 F. 2d 289 (8th Cir. 1975), *cert. den.* 424 U. S. 915 (1976); *Monona Shores, Inc.* v. *U. S. Steel Corp.*, 374 F. Supp. 930, 936-939 (D. Minn. 1973).

Here, Fontana had the measuring rod of a nine year history of dealing with Hertz and Avis local licensees, including their audits and a record of each rental contract written. (App. 64a, 83a). Such prior business history may be used to project estimates of future lost profits. *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F. 2d 661, 664 (6th Cir. 1965). In addition, profits in comparable businesses may be used. *North Texas Producers* v. *Young*, 308 F. 2d 235 (5th Cir. 1962). Furthermore, damages accruing after the filing of suit may be

used to determine future damages. *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368, 394 (9th Cir. 1957), *cert. den.* 355 U. S. 835 (1957).

In similar refusal to deal cases involving gasoline and auto franchises, once the initial termination and "some damage" therefrom were established, juries have been allowed to consider how far into the future the litigants would have dealt but for the termination and for how long damages would continue to flow. See *Simpson* v. *Union Oil Corp.*, 411 F. 2d 897, 909 (9th Cir. 1969), *rev'd on other grounds* 396 U. S. 13 (1969); *Lehrman* v. *Gulf Oil Corp.*, 464 F. 2d 26, 46 (5th Cir. 1972), 500 F. 2d 659, 1077 (1974), *cert. den.* 409 U. S. 1077 (1972).

Further, the second *Zenith* decision left great discretion to the District Court to determine the sufficiency of damages. *Zenith* v. *Hazeltine, supra* at 340. Here the District Court found they were not speculative.

II. The Decision of the Courts Below Does Not Conflict with Holdings in Other Circuits

The decision below is consistent with decisions in other circuits. Each case cited by Petitioner to show an alleged conflict contains no contrary holdings and is factually distinguishable.

In *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F. 2d 117 (5th Cir. 1975), the Fifth Circuit reiterated the general rule that to avoid the bar of the statute of limitations there must be an injurious illegal overt act *within* the limitations period and not merely an absence of dealing, stating as follows:

> It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action. (*Id.* at 128)

There plaintiff alleged a conspiracy to monopolize and exclude it from the motion picture accessory industry. The Court did

not preclude a statute of limitations defense, but remanded for a determination of whether there was such an injurious act within the four years prior to suit. Upon remanding the Court's direction was as follows:

> We think it critical that the Court determine whether there was, during the period sued upon, a mere absence of dealing, or whether there was some specific act or word precluding Poster from obtaining supplies from National Screen. (*Id.* at 128)

In the instant case there was but an "absence of dealing" during the period sued upon, and no allegation of a later act precluding dealing.

The Court in *Poster Exchange* also indicated that there are some fact situations where there is only one damage causing act, where the violative act is "final at its impact". *Id.* at 126. The Court cited as examples of such situations, dealership terminations, and footnote 18 of its decision refers in this regard to *Emich Motors Corp.* v. *General Motors Corp., supra,* a case relied upon by Respondent and the District Court below. The initial refusal to deal was not necessarily "final at its impact" in *Poster Exchange,* since there was no contract or franchise agreement between the parties which could be terminated. In tne instant case, however, there was an "agreement" between the plaintiff and each of the individual defendants, which was "terminated" in May, 1969. (App. 4a). The termination of that contractual agreement is analogous to a dealer termination. It was, in the language of *Poster Exchange,* "by its nature permanent at initiation without further acts" *Id.* at 126. Thus the holding below, that the May, 1969 termination was the act from which the state of limitations ran, fully accords with *Poster Exchange.*

Likewise there is no conflict between the decision below and the Ninth Circuit, Fifth Circuit and Third Circuit cases cited by Petitioner: *Twin City Sportservice, Inc.* v. *Charles O. Finley & Company,* 512 F. 2d 1264 (9th Cir. 1975); *Imperial Point*

Colonnades Condominium, Inc. v. *Mangurian*, 549 F. 2d 1029 (5th Cir. 1977); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967), *aff'd in part*, 392 U. S. 481 (1968).

These cases are factually inapposite. Each of these cases involved an antitrust claim based upon an alleged illegal contract entered into before the statute of limitations period and continuing in force during the limitations period. In *Twin City Sportservice*, during the limitations period defendant sought to enforce and collect benefits under a contract with a baseball club owner under which defendant claimed the exclusive right to operate baseball park concessions. In the *Mangurian* case a condominium developer collected rents during the limitations period under an allegedly illegal recreational facility lease. In the *Hanover* case a shoe machinery manufacturer collected benefits during the limitations period under machinery leases. In each case the Court allowed an antitrust claim challenging the contract to be asserted despite the statute of limitations. Each of these is far different from, if not opposite, to the facts here, where a contract was *terminated before* the limitations period.

Despite the factual dissimilarity, the theory of the foregoing cases is the same basic theory applied below in this case: that there must be an injurious overt act in the limitations period. Unlike this case, in those cases such an act was found within the limitations period, in the enforcement of a contract or the collection of benefits under it. *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian, supra* at 1036.[1]

III. No Important Private Antitrust Action Policy Issue Is Involved Here

Petitioner finally suggests that this case is important to the viability of private actions to enforce the antitrust laws. Based upon the facts of this case such a claim cannot be supported.

1. The recent Fifth Circuit decision in City of *El Paso* v. *Darbyshire Steel Co.*, 1978-1 Trade Cases ¶ 74,808 (5th Cir. 1978) suggests that the rationale of the *Mangurian* case may in the future be limited to situations where damages are "speculative" under *Zenith*.

The injury for which Petitioner claims damages, the loss of commission income from a refusal to deal, is purely personal. It is more in the nature of a contract claim than an antitrust claim. Indeed, as noted above, it is the subject of a pending contract action. Such claims not brought as a member of the injured public are extraneous to the policy of the antitrust laws, which are for "the protection of competition, not competitors," *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1961); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). Not only is no significant public interest involved here, but dismissal of this antitrust action still leaves petitioner the remedy of its pending contract action.

Further, Petitioner's delay in bringing suit, and awaiting the accumulation of damages, when it knew immediately of the alleged essential antitrust elements, does not serve any public interest. Rather, Petitioner's delay justifies the application of the statute of limitations. The purpose of the statute is "not only to bring about a condition of repose but also to enable a potential defendant to have timely notice of any alleged dereliction." *Isthmian Lines, Inc.* v. *Rosling*, 360 F. 2d 926, 927 (2nd Cir. 1966). Statutes of limitations are also intended "to force suits to be brought without unreasonable delay so that neither party will be advantaged or disadvantaged by the passage of time." *Vason* v. *Nickey*, 438 F. 2d 242, 244 (6th Cir. 1971). As stated by this Court in *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348 (1944):

> Statutes of limitations . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

The Court in *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F. 2d 389, 394 (6th Cir. 1975), citing *Wood* v. *Carpenter*, 101 U. S. 135 (1879), also stressed that: "statutes of limitation are vital to the welfare of society and are favored in law."

Furthermore if, as Petitioner argues, a new cause of action accrues each day a rental agreement is written after the termination, then the statute of limitations will never run. According to this logic if a plaintiff intentionally sits and waits while a defendant commits a wrongful act and thereafter damages flow for 50 years, it could then still sue for the last four years worth of damages. As the Court in *Southeastern Hose, supra,* noted, such a "construction" makes a mockery of the language of any statute of limitations that sets forth a fixed time period. Moreover, if accepted in this setting such an argument would vitiate the statute of limitations in similar contractual termination cases.

Finally, this case turns on peculiar facts, not likely to recur. It is episodic and the decision will affect virtually no one other than Petitioner and Respondents, since Petitioner ceased doing business at the airport in January, 1975.

CONCLUSION

For all the foregoing reasons Respondent, The Hertz Corporation, respectfully requests that the Petition be denied.

Respectfully submitted,

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